TUAN HAJI ISHAK ISMAIL

v.

LEONG HUP HOLDINGS BERHAD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' MAHADEV SHANKAR JCA
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J
[CIVIL APPEAL NOS. W-02-218-95, W-02-219-95, W-02-245-95,
W-02-248-95, W-02-274-95]
29 NOVEMBER 1995

COMPANY LAW: *Public company - Board of Directors - Representation - Agreements between certain shareholders to ensure continued representation to Board of Directors - Effect - Whether conferring a legitimate expectation of a right to directorship as against the company and other shareholders - Whether constituting an enforceable cause of action - Companies Act 1965 ss. 181(1)(a), 128(1).*

COMPANY LAW: *Section 128(1) Companies Act - Shareholders - Voting right - Right to vote for appointment of directors - Whether could be fettered by private agreements between certain shareholders and directors - Section 128(1) - Whether to override provision of s. 181 of Act.*

COMPANY LAW: *"Oppression" and "disregard" of a member - Section 181(1)(a) Companies Act - Invocation of section - Prerequisites - Whether there must be a visible departure from the standards of fair dealing - Whether involving something more than a failure to take account of the minority's interest - Use of majority's voting power to vote down the minority - Whether an oppression.*

PRACTICE & PROCEDURE: *Petition - Striking out - Order 18 r. 19(1)(a) Rules of the High Court 1980 - Assumption of truth of primary facts - Whether petitioner's inferences from primary facts to be assumed to be true - Words "plain" and "obvious" in Order - Perception - Whether that of a person who has the necessary expertise.*

The nine appellants in these six appeals were respondents in the Court below. They were appealing against the judgment of the learned Judge for dismissing their application under O. 18 r. 19(1)(a) Rules of The High Court 1980 to set aside a petition filed against them by Leong Hup Holdings Berhad (Leong Hup). The facts showed that Leong Hup, Golden Plus Holdings Berhad (Golden Plus), Kenanga Nominees (Tempatan) Sdn. Bhd. (sixth respondent) and TA Nominees Sdn. Bhd. (seventh respondent), were among the shareholders of KFC Holdings (Malaysia) Berhad (KFCM), holding 29.65%, 28.49%, 9.18% and 8.7% respectively of the equities therein. Both Leong Hup and Golden Plus had three nominees each on the Board of Directors of KFCM. Leong Hup was represented by Kevin Lau, Francis Lau and Lau Chong Wang (the Lau Brothers) while Golden Plus was represented by the first three respondents.

Misunderstandings arose between the Lau Brothers and the respondents, and in the upshot, the sixth and seventh respondents requisitioned for an Extraordinary General Meeting (EGM) of KFCM to remove the Lau Brothers from the Board. Leong Hup filed the petition aforesaid and by that, sought to injunct the sixth and seventh respondents from proceeding with the requisition, and to restrain the shareholders of KFCM from acting in concert to vote for the

resolutions. The petition alleged that prior to its acquirement of the shares in KFCM in 1993, the first and the second respondents had made representations to Leong Hup which in law gave Leong Hup a legitimate expectation to remain on the Board without any interference from the respondents. The petition also adverted to various agreements entered into between Leong Hup and KFCM or between the Lau Brothers and the first three respondents, which Leong Hup alleged had accorded them the said expectation. These apart, it was also alleged that the acts of the respondents amounted to an oppression and a disregard of Leong Hup's interest within the meaning of s. 181(1) of the Companies Act 1965 (the Act).

The respondents argued that the alleged representations and agreements were irrelevant because KFCM was a public company, and a group of shareholders acting for themselves or purportedly acting on behalf of the company, could not contract out of s. 128 of the Companies Act (the Act) which conferred a statutory right to shareholders to remove directors at a general meeting, and which also overrode the provision of s. 181(1).

In dismissing the respondents' application, the learned Judge took the view that Leong Hup's claim to legitimate expectation was not without substance and the petition, hence, could not be disposed of under O. 18 r. 19(1)(a). The learned Judge opined that *"the cases on legitimate expectation cited by the first respondent were complex and therefore merited forensic consideration at a trial"*, that *"the petition was properly brought under s. 181 of the Act"* and that *"the question posed by s. 218(1) of the Act had not been sufficiently argued by the parties"*, and so, did not consider it right that the petition should be struck out without *"a thoroughly researched consideration of the question"*. Before the appeal Judges here, the respondents additionally put forth the argument that the trial Judge, in taking this approach, had in law abdicated his function, as the issue he had to decide was not to be predicated on what further facts Leong Hup could establish at the trial or whether further researches could lend support to the claim of legitimate expectation. The primary issues that arose were:

1. Whether legitimate expectation could arise on the allegations made in the petition.
2. If so, whether it was binding on all the other shareholders of KFCM, or put it another way, whether s. 128 of the Companies Act overrode s. 181 thereof.
3. Whether the acts complained of amounted to "oppression" or "disregard".

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The Lau brothers held office as directors of KFCM by virtue of a contract with KFCM, and KFCM alone, an office to which they could only be elected by the shareholders of KFCM. Even if there was a specific agreement between the respondents and the Lau Brothers that Leong Hup would be given permanent representation on the Board such an agreement could not stop KFCM from tabling an ordinary resolution for the removal of the Lau Brothers from its Board. The phrase "a public company may by ordinary resolution remove a director" in s. 128(1) means simply that a simple majority of the shareholders of the company may vote to remove a director. No agreement made by the directors or the company can fetter that right and notwithstanding anything said in the articles, the company cannot contract itself out of this right. Also, the Courts will not interfere with the statutory right of shareholders to remove directors. Section 128(1) thus totally precludes Leong Hup from the relief it claimed.

[2] Further, the agreement was a private agreement between Leong Hup and some of the directors of KFCM who at best controlled about 30% of the KFCM's shares. In the circumstances, the agreement, and therefore Leong Hup's alleged entitlement to Board representation, is not binding on KFCM as a company, and/or against all the shareholders of KFCM, and/or against the fourth to the seventh respondents, and/or against the shareholders of these companies. Viewed in this light, Leong Hup's claim to Board representation could not constitute an enforceable cause of action.

[3] Kenanga Nominees and TA Nominees were not directors of KFCM. Even assuming that they as shareholders would vote along with the other shareholders to expel the Lau Brothers, the power to vote in general meeting is not a fiduciary power, and a shareholder owes no duty to anybody as to how he exercises his vote. This apart, it is not illegal for any two or more stockholders to unite, upon a course of corporate action, or upon the officers they choose to elect or to remove provided that in doing so they do not contravene any express statute or contract or contemplate any illegal object, fraud or opression against the other shareholders of the company. The respondents, hence, may come to an agreement among themselves that in exercising any voting rights the shares held by them shall only be voted as agreed. The averments as pleaded, the respondents contended, could not provide the basis for any legitimate expectation as alleged. And nor could those facts constitute "oppression" within the meaning of s. 181 because there is no right accorded by law for Leong Hup to restrain the respondents from voting at the EGM.

[4] For a case to be brought within s. 181(1)(a), the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Before a case of oppression can be made, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect. Similarly, "disregard" involves something more than a failure to take account of the minority's interest. There must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure.

[5] Under s. 181(1)(a), the act required is one of KFCM or the resolution is one proposed by the members of KFCM and it must unfairly discriminate against Leong Hup in its capacity as a member or shareholder of KFCM. It follows that, in the instant case, relief under s. 181(1)(a) would only be available if those who have control of KFCM conduct the affairs of the company in a manner oppressive to Leong Hup, or the directors of KFCM have exercised their power in a manner oppressive to Leong Hup, or either species of acts are being done in disregard of Leong Hup's interest in KFCM. However, none of these elements were present here. The "oppression", "disregard" or "unfair discrimination" allegedly demonstrated in the present case was that the requisitionsts had called for an EGM proposing resolutions to remove the Lau Brothers, and the probability that at the EGM the majority of the shareholders would vote the Lau Brothers out. Such fear did not give Leong Hup any legitimate expectation enforceable against the respondents.

[6] The suggestion that s. 128(1) did not apply because it is limited to agreements between the company and a director concerning the tenure of a directorship whereas in the present case the claim to a legitimate expectation arose out of agreements between shareholders,

cannot be sustained. The first three respondents did not hold any shares in KFCM and there is no proper material in the petition from which the Court could infer that they were acting on behalf of all the other shareholders of KFCM. In the circumstances it is impossible for the Court to hold that the fourth, fifth, sixth and seventh shareholders were not entirely free to vote at the EGM in any way they pleased as they had a statutory right to do so which could not be constrained by any agreement to the contrary. The respondents' submission on s. 128(1) must succeed and this section must be held to override s. 181.

[Appeals allowed. Petition struck out].

[Bahasa Malaysia Translation of Headnotes]

UNDANG-UNDANG SYARIKAT: *Syarikat awam - Lembaga Pengarah - Perwakilan - Perjanjian antara beberapa pemegang saham bagi memastikan perwakilan yang berterusan didalam Lembaga Pengarah - Kesan - Samada memberikan pengharapan yang sah mengenai suatu hak kepada jawatan pengarah terhadap syarikat dan lain-lain pemegang saham - Samada membentuk suatu kausa tindakan yang boleh dikuatkuasakan - Akta Syarikat 1965 ss. 181(1)(a), 128(i).*

UNDANG-UNDANG SYARIKAT: *Seksyen 128(c) Akta Syarikat - Pemegang-pemegang saham - Hak mengundi - Hak mengundi bagi melantik pengarah - Samada boleh dihalang oleh perjanjian-perjanjian persendirian antara beberapa pemegang-pemegang saham dan pengarah-pengarah - Seksyen 128(1) - Samada menakluk peruntukan s. 181 Akta tersebut.*

UNDANG-UNDANG SYARIKAT: *"Oppression" (Penekanan) dan "Disregard" (tidak mempedulikan) seseorang ahli - Seksyen 181(1)(a) Akta Syarikat - Pemakaian seksyen - Prasyarat - Samada perlu terdapat penyimpangan yang jelas daripada standard-standard urusan yang adil - Samada melibatkan sesuatu yang lebih daripada suatu kegagalan untuk mengambilkira kepentingan minoriti - Penggunaan kuasa pengundian majoriti untuk mengalahkan minoriti - Samada merupakan suatu penekanan.*

AMALAN & PROSEDUR: *Petisyen - Membatalkan - Aturan 18 Kaedah 19(1)(a) Kaedah-kaedah Mahkamah Tinggi 1980 - Andaian kebenaran fakta-fakta utama - Samada inferens pempetisyen daripada fakta-fakta utama boleh diandaikan sebagai benar - Perkataan-perkataan "plain" (biasa) dan "obvious" (ketara) dalam perintah - Tanggapan - Samada bagi seseorang yang mempunyai kemahiran yang perlu.*

Kesembilan-sembilan perayu dalam keenam-enam rayuan ini merupakan responden dalam Mahkamah di bawah. Mereka merayu terhadap penghakiman Hakim yang bijaksana kerana menolak permohonan mereka di bawah A. 18 k. 19(1)(a) Kaedah-kaedah Mahkamah Tinggi 1980 untuk mengenepikan satu petisyen yang difailkan terhadap mereka oleh Leong Hup Holdings Berhad (Leong Hup). Fakta-fakta menunjukkan bahawa Leong Hup, Golden Plus Holdings Berhad (Golden Plus), Kenanga Nominees (Tempatan) Sdn. Bhd. (responden keenam) dan TA Nominees Sdn. Bhd. (responden ketujuh), adalah antara pemegang-pemegang saham KFC Holdings (Malaysia) Berhad (KFCM), memegang sebanyak 29.65%, 28.49%, 9.18% dan 8.7% masing-masingnya dari ekuiti di dalamnya. Kedua-duanya Leong Hup dan Golden Plus mempunyai tiga nomini setiap satu pada Lembaga Pengarah KFCM. Leong Hup telah diwakili oleh Kevin Lau, Francis Lau dan Lau Chong Wang (Lau Brothers) sementara Golden Plus pula telah diwakili oleh ketiga-tiga responden yang pertama.

Salah faham telah berbangkit antara Lau Brothers dan responden-responden, dan dalam pertelingkahan tersebut, responden keenam dan ketujuh telah menuntut diadakan satu Mesyuarat Agung Luarbiasa (EGM) KFCM untuk mengeluarkan Lau Brothers daripada Lembaga Pengarah. Leong Hup telah memfailkan petisyen yang tersebut di atas dan melaluinya, berusaha untuk menghalang responden keenam dan ketujuh daripada meneruskan rekuisisi tersebut, dan untuk menghalang pemegang-pemegang saham KFCM daripada bertindak bersama-sama untuk mengundi bagi resolusi tersebut. Petisyen tersebut mengatakan bahawa sebelum pemerolehan saham-sahamnya dalam KFCM dalam tahun 1993, responden pertama dan kedua telah membuat representasi kepada Leong Hup yang mana telah memberikan Leong Hup harapan yang sah disisi undang-undang untuk kekal di Lembaga Pengarah tanpa sebarang gangguan daripada responden-responden. Petisyen tersebut juga menekankan beberapa perjanjian yang telah dimasuki antara Leong Hup dan KFCM atau antara Lau Brothers dan ketiga-tiga responden yang pertama, yang mana Leong Hup katakan telah memberikan mereka harapan tersebut. Selain daripada itu, telah juga dikatakan bahawa perbuatan responden membawa kepada suatu penindasan dan tidak menghiraukan kepentingan Leong Hup dalam maksud s. 181 (1) Akta Syarikat 1965 (Akta tersebut).

Responden berhujah bahawa representasi dan perjanjian-perjanjian yang dikatakan itu adalah tak relevan kerana KFCM adalah sebuah syarikat awam, dan satu kumpulan pemegang-pemegang saham yang bertindak bagi diri mereka sendiri atau bermaksud untuk bertindak bagi pihak syarikat tersebut, tidak boleh mengeluarkan dirinya daripada s. 128 Akta Syarikat (Akta tersebut) yang memberikan hak statutori kepada pemegang-pemegang saham untuk mengeluarkan pengarah-pengarah di sesuatu mesyuarat agung dan yang mana juga menakluk peruntukan s. 181(1).

Dalam menolak permohonan responden, Hakim yang bijaksana berpendapat bahawa tuntutan Leong Hup kepada harapan yang sah adalah berasas dan petisyen tersebut, dengan itu, tidak boleh dilupuskan dibawah A. 18 k. 19(1)(a). Hakim yang bijaksana memberikan pendapat bahawa "the cases on legitimate expectation cited by the first respondent were complex and therefore merited forensic consideration at a trial", bahawa "the petition was properly brought under s. 181 of the Act" dan bahawa "the question posed by s. 218(1) of the Act had not been sufficiently argued by the parties", dan dengan yang demikian, tidak menganggapkannya betul supaya petisyen tersebut dibatalkan tanpa "a thoroughly researched consideration of the question". Di hadapan Hakim-hakim rayuan, responden telah menambah hujahan bahawa Hakim perbicaraan, dalam mengambil pendekatan ini, telah melepaskan fungsinya disisi undang-undang, kerana isu yang beliau kena putuskan tidak boleh ditentukan berdasarkan apakah fakta-fakta selanjutnya yang boleh dikemukakan oleh Leong Hup di perbicaraan tersebut atau samada kajian-kajian yang seterusnya boleh menyokong tuntutan harapan yang sah. Isu-isu utama yang berbangkit adalah:

1. Samada harapan sah boleh berbangkit atas pengataan yang dibuat dalam petisyen tersebut.

2. Jika sedemikian, samada ianya mengikat kesemua pemegang-pemegang saham lain KFCM, atau dalam maksud lain, samada s. 128 Akta Syarikat menakluk s. 181.

3. Samada perbuatan-perbuatan yang diadukan membawa kepada "oppression" atau "disregard".

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Pihak Lau Brothers memegang jawatan sebagai pengarah-pengarah KFCM melalui satu kontrak dengan KFCM, dan KFCM sahaja, suatu jawatan yang mana mereka hanya boleh dilantik oleh pemegang-pemegang saham KFCM sahaja. Walaupun terdapat satu perjanjian spesifik antara responden-responden tersebut dan Lau Brothers bahawa Leong Hup akan diberikan perwakilan yang tetap pada Lembaga tersebut, perjanjian yang sedemikian tidak boleh menghalang KFCM daripada membentangkan resolusi biasa bagi mengeluarkan Lau Brothers daripada Lembaganya. Ungkapan "a public company may by ordinary resolution remove a director" dalam s. 128(1) Akta bermaksud bahawa suatu majoriti pemegang-pemegang saham syarikat tersebut boleh mengundi untuk mengeluarkan seseorang pengarah. Tidak akan terdapat perjanjian yang dibuat oleh pengarah-pengarah atau syarikat tersebut yang boleh membelenggu hak itu dan tanpa menghiraukan apa-apa yang dinyatakan dalam artikel tersebut, syarikat tidak boleh melepaskan dirinya daripada hak ini. Juga, Mahkamah tidak akan mencampuri hak statutori pemegang-pemegang saham untuk mengeluarkan pengarah-pengarah. Seksyen 128(1) dengan itu menghalang Leong Hup daripada mendapat relief yang dituntutnya.

[2] Selanjutnya, perjanjian tersebut merupakan perjanjian persendirian antara Leong Hup dan sebilangan daripada pengarah-pengarah KFCM yang mana menguasai lebihkurang 30% dari saham-saham KFCM. Dalam keadaan tersebut, perjanjian tersebut, dan dengan itu hak Leong Hup yang dikatakan kepada perwakilan Lembaga, tidak mengikat KFCM sebagai sebuah syarikat, dan/atau terhadap kesemua pemegang-pemegang saham KFCM, dan/atau terhadap responden-responden keempat hingga ketujuh, dan/atau terhadap pemegang-pemegang saham syarikat-syarikat ini. Memandangkan hal ini, tuntutan Leong Hup kepada perwakilan Lembaga tidak boleh membentuk satu kausa tindakan yang boleh dikuatkuasakan.

[3] Kenanga Nominees dan TA Nominees tidak merupakan pengarah-pengarah KFCM. Walaupun menganggapkan bahawa mereka, sebagai pemegang-pemegang saham, akan mengundi bersama-sama dengan pemegang-pemegang saham yang lain untuk memecat Lau Brothers, kuasa untuk mengundi dalam mesyuarat agung bukannya merupakan kuasa fidusiari, dan seseorang pemegang saham tidak berkewajipan untuk menerangkan kepada sesiapa mengenai bagaimana beliau melaksanakan undinya. Sebaliknya, ianya adalah sah bagi mana-mana dua atau lebih pemegang saham untuk bergabung, di atas suatu perjalanan tindakan korporat, atau diatas pegawai-pegawai yang mereka pilih untuk lantik atau keluarkan dengan syarat dalam melakukan sedemikian mereka tidak melanggari mana-mana statut atau kontrak nyata ataupun memikirkan apa-apa niat yang tak sah, fraud atau penindasan terhadap pemegang-pemegang saham yang lain dari syarikat tersebut. Responden-responden disini dengan itu, boleh mencapai persetujuan dikalangan mereka sendiri bahawa dalam melaksanakan mana-mana hak mengundi, saham-saham yang dipegang oleh mereka hanya harus diundi sepertimana yang dipersetujui. Pengataan-pengataan seperti yang diplidkan, responden menegaskan, tidak dapat memberikan asas bagi mana-mana harapan sah sepertimana yang dikatakan. Fakta-fakta itu juga tidak dapat membentuk "oppression" dalam maksud s. 181 kerana tidak terdapat hak yang diberikan oleh undang-undang bagi Leong Hup menghalang responden-responden daripada mengundi di EGM.

[4] Untuk sesuatu kes termasuk dalam lingkungan s. 181(1)(a), pengadu haruslah mengenalpasti dan membukti "oppression" atau "disregard". Hakikat bahawa satu atau lebih daripada mereka yang menguruskan syarikat mempunyai kuasa pengundi majoriti dan, dalam bergantung kepada kuasa tersebut, membuat dasar atau keputusan-keputusan eksekutif, dengan yang mana pengadu tidak bersetuju, adalah tidak memadai. Sebelum sesuatu kes penindasan boleh dibuat, harus terdapat penyimpangan yang ketara daripada standard urusan yang adil dan suatu pelanggaran terhadap urusan yang adil yang mana seseorang pemegang saham berhak untuk harapkan. Begitu juga, "disregard" melibatkan sesuatu yang lebih daripada kegagalan untuk mengambilkira kepentingan minoriti ... Haruslah terdapat kesedaran mengenai kepentingan itu dan keputusan yang jelas untuk menolaknya atau mengenepikannya ataupun mensia-siakan prosedur syarikat yang betul.

[5] Di bawah s. 181(1)(a), perbuatan yang diperlukan adalah daripada KFCM atau resolusi tersebut adalah yang dicadangkan oleh ahli-ahli KFCM dan ianya mestilah secara tidak adil membezakan Leong Hup dalam kedudukannya sebagai ahli atau pemegang saham KFCM. Ianya mengikut bahawa dalam kes semasa ini, relief di bawah s. 181(1)(a) akan hanya boleh didapati jika mereka yang menguasai KFCM mengendalikan hal-ehwal syarikat menurut cara yang menindas Leong Hup, atau pengarah-pengarah KFCM telah melaksanakan kuasa mereka menurut cara yang menindas Leong Hup atau perbuatan-perbuatan itu dilakukan tanpa menghiraukan kepentingan Leong Hup dalam KFCM. Walaubagaimanapun, tidak satu pun dari unsur ini wujud disini. "Oppression", "disregard" atau "unfair discrimination" yang dikatakan ditunjukkan dalam kes semasa ini adalah bahawa rekuisisi tersebut telah memanggil satu EGM, mencadangkan resolusi-resolusi untuk mengeluarkan Lau Brothers, dan kemungkinan di EGM tersebut pemegang-pemegang saham majoriti akan mengundi Lau Brothers keluar. Kebimbangan yang sedemikian tidak memberi Lau Brothers harapan yang sah yang boleh dikuatkuasakan terhadap responden.

[6] Saranan bahawa s. 128(1) tidak terpakai kerana ianya terhad kepada perjanjian-perjanjian antara syarikat tersebut dengan seorang pengarah berhubung dengan tempoh masa jawatan pengarah, sedangkan dalam kes semasa ini, tuntutan kepada harapan sah berbangkit daripada perjanjian antara pemegang-pemegang saham, tidak boleh dipertahankan. Ketiga-tiga responden pertama tidak memegang apa-apa saham dalam KFCM dan tidak terdapat bahan wajar dalam petisyen tersebut daripada yang mana Mahkamah boleh membuat kesimpulan bahawa mereka bertindak bagi pihak kesemua pemegang saham KFCM yang lain. Dalam keadaan yang sedemikian ianya mustahil bagi Mahkamah memutuskan bahawa pemegang-pemegang saham keempat, kelima, keenam dan ketujuh adalah tidak bebas untuk mengundi di EGM tersebut dalam apa cara yang mereka suka kerana mereka mempunyai hak statutori untuk melakukan sedemikian yang mana tidak boleh dipaksa oleh mana-mana perjanjian bertentangan dengannya. Hujahan responden atas s. 128(1) mestilah berjaya dan seksyen ini haruslah diputuskan sebagai menakluk s. 181.

[Rayuan dibenarkan. Petisyen dibatalkan].

Cases referred to:
McKay v. Essex Area Health Authority [1982] QB 1116 ***(foll)***
Re Saul D. Harrison & Sons [1994] BCC 162 ***(foll)***
Re Ringtower Holdings plc [1989] 4 BCC 82 ***(refd)***
Dreyfus v. Peruvian Guano Co. [1892] 41 Ch. D 151 ***(refd)***
Johnson v. Johnson [1884] 33 ER 239 ***(refd)***
Greenwell v. Porter [1902] 1 Ch. 530 ***(foll)***

Puddephatt v. Leith [1916] 1 Ch. 200 ***(foll)***
Re A & BC Chewing Gum Ltd. [1975] 1 WLR 579 ***(dist)***
Greenhalgh v. Ardene Cinemas Ltd. [1951] Ch. 286 ***(foll)***
Ebrahimi v. Westbourne Galleries [1973] AC 360 ***(foll)***
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1988] 2 MLJ 227 ***(foll)***
Re Saul D. Harrison & Sons plc [1994] BCC 475 ***(foll)***
Re Ringtower Holdings plc [1989] 5 BCC 82 ***(foll)***
Re Blue Arrow plc [1981] BCLC 585 ***(foll)***
Re Tottenham Hotspur plc [1994] Vol. BCLC 655 ***(foll)***
In Re A Company [1983] 1 Ch. 178 ***(foll)***
Re Lundie Brother Ltd. [1965] 2 All ER 692 ***(refd)***
Bentley-Stevens v. Jones & Others [1974] 1 WLR 638 ***(foll)***
Northern Counties Securites v. Jackson & Steeple [1974] All ER 625 ***(foll)***
Soliappan v. Lim Yoke Fan [1968] 2 MLJ 21 ***(foll)***
Dato' H.M. Shah & Ors. v. Dato' Abdullah b. Ahmad [1991] 1 MLJ 91 ***(foll)***
Crofter Hand-Woven Harris Tweed Co. v. Veith [1942] AC 435 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 128, 181, (1)(a), (1)(b), (2), 218(1), (f)
Companies Act 1948 (UK), ss. 184, 210(1), (2), 222(f)
Companies Act 1980 (UK), s. 75
Companies Act 1985, s. 459, 461
Rules of the High Court 1980, O. 1 r. 4, O. 18 rr. 7, 19(1), O. 29 r. 1(2C)

Other sources referred to:
Stroud's Judicial Dictionary, 5th Edn., Vol. 1, p. 378
Gower's Principles of Company Law, 3rd Edn., pp. 562, 571
"*Pooling Agreements Under English Company Law*", Stephen Kruger, 94 LQR, p. 557
Company Law, Farrar, 3rd Edn., pp. 464-465
Pleadings, Principles and Practice, Jacob & Goldrein (1990), p. 220

For the first appellant - Cecil Abraham (R.S. Nathan with him); M/s. Jeyaratnam & Chong
For the second, third and fifth appellants - Y.M. Siew; M/s. Raja Eleena, Siew Ang & Tan
For the fourth appellant - Augustine Poh; M/s. Cheong Kee Fong & Co.
For the sixth appellant - Teh Boon Eng (N. Navaratnam & P. Gananathan with him); M/s. Teh & Associates
For the seventh appellant - Jaswinder Singh; M/s. Megat Najmuddin Leong & Co.
For the eight and ninth appellants - Ghazi Ishak; M/s. Ghazi & Lim
For the tenth appellant - M/s. Ching, Tan & Associates
For the petitioner - K.S. Narayanan (Joseph Yeo & F.M. Bodipalar with him); M/s. Sri Ram & Co.

JUDGMENT

Mahadev Shankar JCA:

In the Court below Leong Hup Holdings Berhad filed a petition for relief under s. 181 of the Companies Act 1965 (the Act) against the first nine respondents ("the respondents") named in the petition. The subject matter of the petition was Leong Hups' alleged entitlement to representation on the board of directors of KFC Holdings (Malaysia) Berhad (KFCM), and to a right thereby to participate in the management of the affairs of this company. The respondents applied to have the petition struck out on the ground that it did not disclose a reasonable cause of action. The trial Judge, Y.A. Tuan Richard Talalla, dismissed the application. Six separate appeals have come before us. These are by:

(i) the first respondent in the suit below;

(ii) the second, third and fifth respondents;

(iii) the fourth respondent;

(iv) the sixth respondent;

(v) the seventh respondent;

(vi) the eight respondent (whose name is actually Kentucky Fried Chicken International Holdings Incorporation) referred to as KFC International and the ninth respondent.

Since there were common questions of law and fact in all six appeals we heard them together. Even though the respondents are in fact the appellants before us, for ease of cross-reference to the judgment of the trial Judge, I have continued to refer to them as respondents in this judgment in the same order as they were listed in the Court below. The petitioner is referred to throughout as "Leong Hup".

Kenanga Nominees (Tempatan) Sdn. Bhd. and TA Nominees Sdn. Bhd. (the sixth and seventh respondents) requisitioned an Extraordinary General Meeting (the EGM) to remove the three brothers (the Lau Brothers) on the KFCM Board who were to represent the interests of Leong Hup. It was eventually fixed to be held on 18 February 1995. To thwart that move Leong Hup filed this petition on l4 February 1995, and obtained an interlocutory injunction from Y.A. Tuan Richard Talalla the next day. (In anticipation of this Grand Care Sdn. Bhd. (a shareholder of KFCM) filed a Petition No. D5-26-5-95 and *inter alia* got an order from Y.A. Dato' Haji Abdul Malek bin Haji Ahmad on 17 February 1995 that the chairman of the EGM be empowered to adjourn the EGM until the interlocutory order had been discharged [see [1995] 3 AMR p. 2477]. This was a collateral proceeding and no further reference will be made to it.)

Initially the respondents proceeded under all the limbs of O. 18 r. 19(l) of the Rules of the High Court 1980. However, in the course of the proceedings the respondents elected to proceed under O. 18 r. 19(l)(a) alone.

In essence Leong Hup's contention was that by virtue of certain representations made by the first three respondents and certain alleged agreements between it and KFCM and between the Lau Brothers and the first three respondents Leong Hup had a legitimate expectation to remain on the KFCM Board without any interference from any of the respondents. In essence the respondents were contending that because KFCM was a public company whose shares were listed on the Kuala Lumpur Stock Exchange (KLSE), the alleged agreements and representations were irrelevant because a group of shareholders whether acting for themselves or purportedly on behalf of the company could not "contract out" of s. 128 of the Act which conferred a statutory right to **all** its shareholders to remove directors at a general meeting. The respondents also contended that the facts pleaded could not provide the basis for any legitimate expectation as alleged or at all.

In his judgment Y.A. Tuan Richard Talalla gave a very detailed account of the factual history and some of the cases cited to him. When it came to the crunch, he said:

I did consider the case law cited on behalf of the respondents especially the cases relied on most namely *Re Blue Arrow plc* [1987] BCLC 585, and *Re Ringtower Holdings plc* [1989] 5 BCC 82. 1 did not however consider that Leong Hup should be deprived of a trial in order to establish facts on which it could attempt to distinguish the said case law.

The respondents prayed in aid the provisions of s. 128(l) of the Act which they claimed to override the provisions of s. 181. Section 128(l) provides that a public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed. This question was not argued as intensely and as deeply as that on legitimate expectation. I did not consider it right that the petition should be struck out without a thoroughly researched consideration of the question.

The respondents' complaint is that in taking this approach the trial Judge abdicated his functions, because the issue he had to decide was not to be predicated on what further facts Leong Hup could establish at the trial or whether further researches could lend support to the claim of legitimate expectation. With respect I think this claim was justified. A position had to be taken one way or the other on the question as to whether the facts alleged in the petition added up to an entitlement to the relief claimed.

This petition is 35 pages long, setting out in great detail the facts Leong Hup relied upon to establish its claim of alleged oppression in the widest sense. It has been paraphrased almost in its entirety in Y.A. Tuan Richard Talalla's judgment. To put the issues in proper focus I have reproduced the salient facts.

KFC International originally ventured into in Malaysia in 1980 through Kentucky Fried Chicken (M) Sdn. Bhd. From its inception George Ting, the second respondent was the key figure in the running of the Malaysian operations. Even then he had a close rapport with Timothy M. Lane (Lane), the ninth respondent, who was the President of KFC International in the Asia-Pacific region. It is self-evident that these entities must have had some working arrangements for the use of the KFC Franchise and the KFC System in Malaysia.

KFCM only became a public company on 13 March 1987. Its shares were listed on the KLSE on 11 November 1988. The petition does not say what its authorised or issued capital was on that date, but that by December 1992 the authorised capital was 150 million ordinary shares of RM1.00 each of which 101,275,100 had been credited as paid up.

The negotiations between Leong Hup and KFCM to go into collaboration is said to have taken place between December 1992 and early March 1993. Kevin and Francis Lau represented Leong Hup. The first respondent (Ishak) and George Ting represented KFCM. These negotiations resulted in a management agreement (the management agreement) dated 12 March 1993. None of its terms have been specifically incorporated into the petition. All it says is that Leong Hup and its subsidiaries were in the business of breeding poultry and thereafter processing and retailing them. KFCM was in the same line with the addition of feedmill and quick service restaurants. In view of the synergy between the business of Leong Hup and KFCM, Leong Hup says it was induced by Ishak and George Ting to enter into a co-operation, which was to be established by Leong Hup taking a 20% stake in KFCM and Kevin and Francis Lau being appointed to the board of KFCM with KFCM taking a corresponding stake in Leong Hup. Between 24 February 1993 and 1 March 1993 Leong Hup took up 18,661,000 shares in KFCM for RM93,974.195.76. It is to be noted that these shares

were acquired **before** the management agreement was executed on 12 March 1993. The petition does not state whether Leong Hup bought these shares from the respondents or any of them or whether they were bought in the open market; it does state that under the management agreement Leong Hup was to manage KFCM's upstream operations, whilst Leong Hup appointed KFCM to assist in it in the management of Leong Hup's Ayam Al retail outlets. Kevin and Francis Lau were only appointed to the Board of KFCM on 28 June 1993. Francis was put in charge of upstream operations in which he was already involved. KFCM is stated to have taken up a 10% stake in Leong Hup, but there are no details as to how these were acquired or in what way it could be described as a "corresponding stake" to the 20.27% of KFCM which Leong Hup had acquired. The petition does not state when George Ting was appointed to the Leong Hup Board.

The petition then alleges, "The representations by the 1st and 2nd respondents and the agreements reached with your petitioner are hereinafter referred to as the "the underlying agreements"." Bearing in mind that what was being contended by Leong Hup was that it had an irrevocable right to count on the active support of the respondents to remain on the KFCM board for an indefinite period it will be useful to ask ourselves what these so called "underlying agreements" were. It is not alleged that the management agreement contained any terms providing guaranteed board representation by each company in the other. If there was some collateral agreement between Kevin and Francis Lau on the one hand and Ishak and George Ting on the other to ensure "cross-board representation" the terms of such an alleged agreement were verbal without any specific details as to how and when it was to come into effect and for how long it was to endure. There is no allegation that a contract had been made between Leong Hup and KFCM, or between Kevin and Francis Lau and Ishak and George Ting that the share capital of KFCM or Leong Hup would be divided in a constant ratio between these two companies or groups of shareholders. Nor is there any allegation that **all** the shareholders of KFCM were parties to these arrangements. At best therefore what we have here is an allegation that two groups of people who are also said to be able to exert a substantial measure of control over their respective companies promised to support the aspirations of each other to representation on their respective boards, and to participation in the affairs of their respective companies (i.e. KFCM and Leong Hup).

The next matter to consider is the AGM held on 26 June 1993. Since Leong Hup had by 1 March 1993 acquired 20.29% of KFCM shares it had 18,661,000 votes to cast. The shareholders passed a resolution authorising the directors to allot new shares from the unissued capital of the company provided the number of shares should not exceed 10% of the **issued share capital**. The petition does not state how Leong Hup voted on this. Kevin and Francis were only appointed to the board of KFCM on 28 June 1993.

The 19 August 1993 is very important in the history of KFCM, because it is the date when Francis was appointed executive director of KFCM. It is also the date when KFCM and KFC International concluded a franchise agreement and two shareholders' agreements which are collectively referred to hereafter and in the petitition as the "franchise agreement". Francis and Kevin and so Leong Hup cannot be heard to say that they were unaware of its terms.

By the franchise agreement KFC International granted KFCM the right to use the KFC system and trademarks, but it provided that George Ting will at all material times during the term of the franchise agreement control, manage and direct the affairs of the operation of the business of KFCM that these rights had been given to KFCM by KFC International in reliance of the standing reputation skill and financial condition of KFCM **and** specifically the first, second, third and fourth respondents and Grand Care Sdn. Bhd., a company controlled by the first,

second and third respondents, and an undertaking that KFCM or specifically the first, second, third and fourth respondents should not sell or transfer any interest in KFCM to any outsider without prior written consent of Lane. Further that no change of control should occur whereby George Ting loses or forfeits possession of the power to personally direct the business management affairs and policies of the company.

Since 12 March 1993 Francis had already taken over the management of the "upstream operations" of KFCM. By 19 August 1993 Kevin and Francis had both been on the board for some six weeks. The management agreement of 12 March 1993 only relates to Leong Hup's involvement in the "upstream operations" of KFCM. The franchise agreement (which was the life blood of KFCM and without which KFCM could not survive) required the managerial power over the entire business of KFCM to be vested in one man alone i.e. George Ting.

The first sign of open confrontation occurred at the board meeting on 12 January 1994 when it was proposed that 10% of a new issue be allotted to Pelantar Matlamat (M) Sdn. Bhd. and a further 10% to Alambori Holdings Sdn. Bhd. Kevin and Francis Lau voted against the proposal because of late notice and because the allotment would be prejudicial to Leong Hup's position in the company and in breach of the alleged underlying agreements which led to Leong Hup buying a stake in the company.

To sustain its opposition to the allotment of this extra 20% Leong Hup filed a Petition No. Dl-26-6-94 (the first petition) against the directors of KFCM alleging oppression and obtained an *ex parte* injunction. In the negotiations which followed between Kevin and Ishak, Leong Hup alleges that it was agreed that Leong Hup would withdraw the petition and discharge the injunction, the issue and allotment of further shares would be rescinded and that the board of directors would be reconsitituted and "the underlying agreements in respect of the relationship between Leong Hup and the Ishak Faction still stand". [See para 13(i)(iv) of the petition]. Leong Hup calls this "the second agreement". No specific date is assigned to it but in the nature of things it must be placed about June 1994.

It is alleged in the petition that the first, second and third respondents were appointed directors of KFCM by reason of their control of the 32.67% held by the fourth respondent [see para 8(a)]. It is further alleged that to induce Leong Hup to take a stake in KFCM the first and second respondents respresented to Kevin and Francis Lau that Leong Hup "co-operate with the first and second respondents in managing the business of" KFCM and such co-operation could only be to the mutual benefit of Leong Hup and KFCM. The second point to be observed is that this "second agreement" as it is referred to in the petition is not in writing and does not purport to be made with KFCM but between some of its shareholders who between them purportedly controlled the destiny of this public listed company.

These observations are material in view of what followed. Leong Hup alleges that pursuant to "the second agreement':

(i) Leong Hup withdrew the first petition;

(ii) the board of directors of KFCM was reconstituted with the Ishak faction represented by the first, second and third respondents and Leong Hup by Kevin, Francis and a third brother Lau Chong Wang (the Lau Brothers);

(iii) George Ting was appointed in place of one Patrick Low Han Hing, the then chief

executive officer and managing director, the third respondent was appointed executive chairman, Lau Chong Wang was made deputy chairman and Kevin was appointed executive director. Patrick Low and one Khoo Cheng Gaik resigned.

The actual mechanics of this cabinet reshuffle is not explained. We are not told if it happened in an annual general meeting, EGM or whether it was decided within the boardroom without all the shareholders being consulted. The new board came up with a new KFC Group Authority Limits and Policies so that neither side could make financial commitments without the joint approval of both parties. The KFCM group organisation was also restructured. The petition does not attempt to reconcile these acts with the obligations of KFCM and its relevant shareholders under the franchise agreement.

The petition only gives the breakdown of the total shareholding as on 23 January 1995. On that day 101,275,100 shares had been issued and paid up or credited as fully paid up. Making what sense I can of the petition it would appear that on 23 January 1995:

(i) Leong Hup held 30,030,00 shares of 29.65%;

(ii) Golden Plus, the fourth respondent, held 28,853,000 shares or 28.49%;

(iii) Kenanga Nominees, the sixth respondent, held 4,222,000 or 4.17%.

What this must mean is that there was nothing in the so-called "underlying agreements" to preclude the parties from acquiring more shares than they intially held. As of March 1993 Leong Hup said it held 20.27% of KFCM's capital. By 23 January 1995 Leong Hup had increased its stake to 29.65%. When and why it did this and what impact it had on the reconstitution of the KFCM Board is not explained.

The petition alleges that the fifth respondent, Pangkal Bahagia, is wholly controlled by the second and third respondents and that about April 1994 Golden Plus, the fourth respondent disposed its entire 28,853,000 ordinary shares to the fifth respondent together with 4,222,000 Cumulative Undeemable Loan Stock, which have since been converted to 4,222,000 shares, and registered in the name of the sixth respondent Kenanga Nominees. Despite the disposal the fourth respondent still remains on the books of KFCM as the registered owner of 28,853,000 shares.

From the notes of evidence of the proceedings in the Court below it appears at the time of the requisition of the EGM Kenanga Nominees, the sixth respondent, held 9.18% and T.A. Nominees, the seventh respondent, held 8.7% of the issued and paid up capital of KFCM. Together with 28.47% still registered in the name of Golden Plus, the fourth respondent, these three entities held 46.29%. Leong Hup held 29.65%. This comes to 75.94%.

Who held the remaining 24.06% is not clear. Mr. C. Abraham has referred us to Articles 2, 13, 93 and 94 of the Main Board Listing Requirements of the KLSE which require that at least 25% of the issued and paid up capital of a listed public company should at all times be in the hands of the public. I cannot take judicial notice of these requirements and must therefore ignore them. Nor can I take any cognizance of a bare assertion in Leong Hup's Counsel's skeletal written submission that the public holds less than 10% of KFCM. So far as the petition goes, therefore, I must infer that 24.06% of the share capital is held by persons who are in no way implicated by Leong Hup's allegations, since they are not parties to this petition.

Leong Hup complains that at the opening of a KFC outlet in Brunei in July 1994 Lane, the ninth respondent, told Kevin Lau to get out of the company's office and leave the management of KFCM to George Ting and threatened to withdraw the franchise agreement if Kevin failed to do so. He also demanded a seat in the KFCM Board. Letters followed on 27 July 1994 from Lane demanding board representation for himself with Arthur Rautio as his alternative, and alleging a breach of the franchise agreement and the shareholders agreement. Leong Hup says that Lane presented an ultimatum that the franchise agreement would be terminated unless:

(i) Lane was given a permanent seat on the KFCM Board;

(ii) the Lau Brothers were evicted from KFCM;

(iii) discussions were commenced to allot shares in KFCM to KFC International.

We need to remember here that under the franchise agreement it was a condition precedent to KFC International's collaboration with KFCM that George Ting should control, manage and direct the affairs of KFCM. The reconstitution of the KFCM Board with all three of the Lau Brothers thereon, with Kevin being appointed executive director and Lau Chong Wang being made deputy chairman, as well as the new KFC Group Authority Limits and Policies which effectively precluded George Ting from making any financial commitments without the approval of the Lau Brothers must have been matters which in KFC International's perception were breaches of the franchise agreement entitling them to protest in the way they did.

At this juncture it would appear that there were nine directors on the board of KFCM namely:

(i) Tuan Haji Ishak bin Ismail (the first respondent);

(ii) George Ting Yew Tong (the second respondent);

(iii) Dato' Haji Mohd. Sarit bin Haji Yusoh (the third respondent);

(iv) Lau Eng Guan ("Kevin");

(v) Datuk Lau Tuang Nguang ("Francis");

(vi) Lau Chong Wang;

(vii) Pierre Jean-Claude Moccand ("Moccand");

(viii) Tan Sri Dato' Dr. Ahmad Mustaffa bin Haji Babjee; and

(ix) Datuk Abang Haji Zainie bin Abang Suhai.

Moccand is a nominee of S.E.A. Trac (Holdings) Limited and the last two persons above-mentioned are independent directors.

Leong Hup appears to think it not irrelevant to this case that on 30 June 1994 Francis was appointed executive director of Ayamas Food Corporation Bhd. (AFCB), that on 1 September 1994 he was appointed chief executive officer/managing director of AFCB and that on 3 November 1994 AFCB was listed on the second board of the KLSE. Both Kevin and Francis claim to have made positive contributions to the financial operations of the upstream operations of KFCM but say that their good work was resented by the Ishak faction who

regarded these activities as a prelude to Kevin and Francis wresting control of the downstream operations of KFCM.

As far as Lane's ultimatum went there was an emergency board meeting on 28 July 1994. A subsequent meeting with Arthur Rautio was followed by a board meeting on 5 August 1994, and a meeting in Hong Kong between Kevin and Lane all of which were inconclusive. By a letter dated 30 November 1994 to the third respondent, Lane again expressed concern to the loss of control and on 6 December 1994 Lane made a public statement in the Star accusing KFCM of breaking the franchise agreement.

Leong Hup viewed the prospect of the termination of the franchise agreement with concern and thought that George Ting was primarily responsible for instigating Lane's actions. So on 23 December 1994 contrary to the franchise agreement which required George Ting to be in control Kevin requisitioned a board meeting to consider the removal of George Ting as chief executive officer and managing director of KFCM. In response on 27 December 1994 the sixth and seventh respondents requisitioned the EGM of the company to remove the Lau Brothers as directors of the company and for the appointment of Lane as a director. Leong Hup also requisitioned an EGM to remove George Ting as director of KFCM.

Kevin then called two board meetings on 28 and 29 December 1994. The board meeting on 28 was called off the same day. It is alleged however that Francis and Kevin and the first, second, third respondents and Mr. Moccand met and it was agreed that the respective parties withdraw the requisitions and proposed resolutions. They shook hands on this and also called off the meeting for 29 December 1994. Again there does not seem to be anything in writing about this agreement.

Since the formal directors meetings called for these two days were called off it is not clear if or how these agreed withdrawals were minuted or documented - Leong Hup claims that the first, second and third respondents spoke for the sixth and seventh respondents in agreeing to withdraw their requisition. Leong Hup did not proceed with its requisition. The sixth and seventh respondents however, allegedly in breach of the agreement of 28 December 1994 gave notice on 3 February 1995 that the EGM would be held on 18 February 1995.

At this point I have some difficulty in reconciling Leong Hup's allegations. In paragraph 22(g) of the petition it is alleged that on 27 January 1995 the 41st board of directors meeting was held at which Kevin told the board that if the EGM was proceeded with it would be an act of bad faith since both parties had agreed to withdraw their requisitions and that the Ishak faction had agreed to vote against all the resolutions. I cannot pretend to understand why if both parties agreed on 28 December to withdraw their respective requisitions and proposals, there was any need to agree also that the Ishak faction should undertake to vote against the resolutions which suggests that the EGM was to go ahead. In paragraph 25(b) of the petition it is stated that the directors' meeting on 27 January 1995 was called to discuss the requisition for the EGM by the sixth and seventh respondents and when Kevin questioned the first second and third respondents with regard to their position or their resolutions they did not respond. What was the need to call for this meeting if there was an agreement on 28 December 1994 to withdraw it? The sixth and seventh respondents only gave notice on 3 February 1995 of their intention to hold the EGM on l8 February 1995.

It has to be noted that the first, second and third respondents are not registered in the books of KFCM as shareholders of KFCM. As the petition was originally drafted it was alleged that they had made the representations to Kevin and Francis as individuals. Halfway

through the hearing in the Court below Leong Hup's Counsel said he proposed to amend the petition to state that they made these representations as directors of **KFCM** which indeed they were at all material times. It is not clear if such an amendment was in fact made and if so when. Golden Plus, the fourth respondent is also a public company. Nowhere in the petition is there any suggestion that the first three respondents are its sole shareholders or that the sole business of Golden Plus is the holding of shares in KFCM. Indeed the petition states that in April 1994 the 4th respondent transferred its entire KFCM holding to Pangkal Bahagia, the fifth respondent. The only allegation in the petition against the fourth respondent is that the first three respondents are capable of controlling the way the voting rights in respect of the 28,853,000 plus 4,222,000 shares which were registered in its name and that they were appointed as directors of KFCM by reason of their control of these shares. It must also be emphasised that the only link of KFC International with KFCM comes about because of the franchise agreement which is a contractual arrangement between the two companies. The petition refers to two shareholders agreements as being part and parcel of the franchise agreement but these are also contractual arrangements between KFC International and the persons involved. Apart from the allegation that Kenanga Nominees, the sixth respondent, was the recipient of the beneficial interest of the 4,222,000 shares which Golden Plus transferred to Pangkal Bahagia there is no allegation against the sixth respondent or for that matter against the seventh Respondent except a general averment that these two companies requisitioned for the EGM in cahoots with the first three respondents to procure the removal of the Lau Brothers and install Lane as a director of KFCM.

To complete the picture let it also be said that the *ex parte* injunction which Leong Hup obtained on 15 February 1995 to stop the fourth, fifth, sixth and seventh respondents from voting at the EGM to be held on l8 February had the desired result because after service, KFCM adjourned the EGM to 11 March 1995. All the respondents then came into Court and after lengthy arguments before the Judge on 27 and 28 February, the *ex parte* injunction was set aside because the trial Judge agreed with the respondents' Counsel that the injunction had run foul of O. 29 r. 1 sub-rule 2C of the Rules of the High Court because in purporting to stop these shareholders from exercising their voting rights, the injunction was tantamount to stopping the progress of the meeting. The trial Judge then proceeded to hear lengthy submissions on whether the petition should be struck out as disclosing no cause of action. Each one of the respondents was separately represented. The hearings continued on 1 and 2 March (when by order of the Court the EGM now fixed for 11 March 1995 was adjourned *sine die* until further order of the Court) and then on 11 April 1995 when at the conclusion of the submissions the trial Judge said what now follows:

> I take the view that this is not an appropriate case for final disposal under those provisions. O. 18 r. 19(l)(a) is reserved for cases that are plainly and obviously hopeless. Upon a consideration of applications under O. 18 r. 19(l)(a) I must assume all the allegations of fact in the petition to be true. A perusal of the petition discloses that there is indeed a reasonable cause of action disclosed therein against the first nine respondents principally and the tenth respondent consequentially.
>
> The petitioner's claim to legitimate expectation cannot in my view be disposed of under O. 18 r 19(l)(a). The cases on legitimate expectation cited by Counsel for the 1st respondent are complex and merit forensic consideration at a trial and not under O. 18 r. 19(1)(a). Likewise the provisions of s. 128(l) of the Companies Act 1965 must be considered in the light of a petition under s. 181 of the Act and the contents of the petition which, I repeat, at this stage of the proceedings I must accept as being true to fact. A trial is required to consider all the evidence in respect thereto including the equitable considerations referred to by Counsel for

the petitioner. The petition does disclose a reasonable cause of action against the 8th and 9th respondents for conspiracy with one or more of the other respondents excluding the 10th respondent to do the things complained of in the petition and falling under s. 181.

I consider the petition to be properly brought under s. 181 of the Act and I do not consider the petitioner is restricted to seeking redress in a civil suit under the common law. Insofar as I am considering the applications to the limited extent of O. 18 r. 19(l)(a) I am precluded from going into the evidence, affidavit or otherwise. Accordingly at this stage it is not for me to consider the relative strengths and weaknesses of the respective cases. Suffice it to say that the petitioner's claim in the petition cannot be said to be so hopeless as to merit the petition being struck out. Accordingly I disallow the applications for an order under O. 18 r. 19(l)(a).

Counsel for the respondents thereupon indicated to me that the respondents were not pursuing the applications on grounds (b)(c) and (d) of O. 18 r. 19(l). It is then that I dismissed the O. 18 applications with costs to be taxed, adding that I would give detailed grounds of decision in the event of an appeal against my order as required by their lordships of the Court of Appeal.

It is difficult to reconcile the trial Judge's observation at the conclusion of the submission (on 11 April 1995) that "A perusal of the petition discloses ... a reasonable cause of action ... against the first nine respondents principally and the tenth respondent consequentially." with the statements in his considered written judgment which followed where he stated in effect that further facts had to be established in order to distinguish the case law cited to him to the effect that no legitimate expectation could arise on the allegations made in the petition, and that thorough research could well show that s. 128(l) did not override the provisions of s. 181.

I suspect that to a considerable extent the trial Judge's mind at the conclusion of the submissions may well have been influenced by the affidavits filed in support of and against the application under the other limbs of O. 18 r. 19(l), whereas when he came to write his judgment which he completed on 21 June 1995 he was constrained to look at the petition alone, and only then realised that the question raised was not easily answered. Was that enough to direct that there should therefore be a trial?

With respect, I think we should first ask ourselves what a "cause of action" is? *Stroud's Judicial Dictionary* 5th edition Vol. 1 page 378 gives twenty separate interpretations of this expression. I think the first is appropriate:

A "**cause of action**" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher M.R., *Read v. Brown*, 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643).

In considering this petition it is useful to remember that by O. 1 r. 4 a "pleading" does not include a "petition". Therefore O. 18 r. 7 (which requires pleadings to be in a summary form of the material facts and not the evidence by which these facts are to be proved) does not apply. But O. 18 r. 19(l)(a) only requires that the Court assume the truth of the "primary **facts**" alleged. It does not require that the petitioner's inferences from those facts should also be assumed to be true, unless those inferences necessarily follow. Nor is the Court obliged to accept the "conclusions" alleged or the relief sought unless the factual basis for those conclusions or relief have been pleaded. In the present case there were nine respondents and the facts alleged against each had to be separately considered.

The words "plain and obvious" also need clarification. This case involved complex questions of company law. What may be "plain and obvious" to a specialist in this field may not be so to another who does not have this specialised knowledge. I therefore feel obliged to state that the standard here is an objective one and implies that the perception required here is that of a person who has the required expertise. Support for this view can be found in *McKay v. Essex Area Health Authority* [1982] QB 1116 where it was held that the right course was for the Court to strike out a claim, even though it required a long and elaborate hearing before the Court was satisfied that there was no cause of action, because the plaintiff was entitled to be relieved of the objection to meet it.

And in *Re Saul D. Harrison & Sons* [1994] BCC 162 at page 179 where Hoffman LJ said:

> But the question in this case is whether on the evidence taken as a whole and assuming in favour of the petitioner any disputed questions of primary fact there is any case to answer. Of course it is always possible that discovery and cross-examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up.

And in *Re Ringtower Holdings plc* [1989] 4 BCC 82 at page 84 where Peter Gibson said:

> Further, I have anxiously throughout borne in mind the cautionary words of Lord Templeman in *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1986] AC 368, at pp. 435-436:
>
> > ... if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.
>
> If the applicants can satisfy the court that the petitioners' claims are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28 pages, as this one does with the proposed amendments) be struck out forthwith.

There is an added dimension to O. 18 r. 19(l) in that the Court will also strike out "if the action has been brought solely to obtain relief which the Court has no power to grant (*Dreyfus v. Peruvian Guano Co.* [1892] 41 Ch. D 151) or if relief be asked on a ground which is no ground for such relief. (*Johnson v. Johnson* [1884] 33 ER 239" - see 1995 1 SCP para 18/19/11).

Before us it was repeatedly submitted for Leong Hup that the order it sought was only to stop the Ishak faction from exercising their voting rights against Leong Hup. With respect, its prayer went a lot further, and I may as well set out the whole of the prayer which reads as follows:

YOUR PETITIONER THEREFORE HUMBLY PRAYS as follows:

A. An order that the Notice of the Requisition of the Extraordinary General Meeting dated 27 December 1994, the Notice of the Extraordinary General Meeting and the Notice of Resolutions dated 3 February 1995 be cancelled as being invalid, null and void and of no effect.

B. An order that in seeking the removal of Lau Chong Wang, Lau Eng Guang and Datuk Lau Tuang Nguang as directors of the company and in attempting to appoint Timothy M. Lane as director, the respondents except the 10th respondent:

(i) are exercising their powers as directors of the company in a manner oppressive to the members of the company including your petitioner and/or in disregard of the interest of the members of the company, including your petitioner; and/or

(ii) did and/or are threatening acts of the company and/or resolutions of members are sought to be passed which have or will unfairly discriminate against or which is and/or will otherwise be prejudicial to the members of the company including your petitioner;

C. An order that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents are in breach of the Underlying Agreements, and the 2nd Agreement and the 28 December 1994 agreement;

D. an order that as between the petitioner and the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents, these respondents are precluded from removing your petitioner's nominees from the Board of Directors of the company;

E. An injunction to restrain the lst, 2nd, 3rd, 4th, 5th, 6th and 7th respondents from exercising the votes in the 33,075,000 ordinary shares in the company or any other shares controlled whether directly or indirectly by these respondents or any of them in support of all the proposed resolutions at the Extraordinary General Meeting of the company to be held on 18 February 1995;

F. An injunction to restrain the 8th and 9th respondents from interfering with meddling in the affairs and management of the company;

G. An order that the 8th and 9th respondents have induced or procured or instigated a breach of the Underlying Agreements, the 2nd Agreement and the 28 December 1994 agreement between your petitioner and the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents;

H. An injunction to restrain the 9th respondents from terminating the Franchise Agreement;

1. An order that the 2nd respondent as operator under the Franchise Agreement and the lst, 2nd, 3rd, 4th and 5th respondents as substantial shareholders as defined under the Franchise Agreement holds the Franchise Agreement in trust for the benefit of the company;

J. An order that the respondents, save the 10th respondents, do pay your petitioner damages to be assessed;

K. Such further or other relief as this Honourable Court deems fit to order;

L. That the respondents to pay all the costs of this petition and all costs, if any, incurred by the company in this petition.

As to the first prayer which was that the notices relating to the EGM requisitioned should be cancelled as being null and void there is no appeal by Leong Hup against the setting aside of the *ex parte* injunction or the postponement of the EGM until further order. It must follow from the stand taken by Mr. K.S. Narayanan in the Court below and before me that he was not out to stop the EGM but only that the third, fourth, fifth, sixth and seventh respondents should be restrained from voting for the resolutions that he was no longer pursuing the claim that the EGM was void.

As its title indicates the petition was grounded in s. 181 of the Companies Act 1965 which reads:

Remedy in cases of oppression

181. (I) Any member or holder of a debenture of a company or, in the case of declared company under part IX the Minister, may apply to the Court for an order under this section on the ground -

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view of bringing to end or remedying the matters complained of make such orders as it thinks fit and without prejudice to the generality of the foregoing the order may -

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself,

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company would be wound up.

(3) Where an order that the company be wound up is made pursuant to subsection (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection that alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

In the context of the present case it needs to be emphasised that relief under this section is available to a **member**, and Leong Hup is suing for relief as a member in its own right. To put it another way Leong Hup is not suing in a representative capacity for some injury done

to the company but in its personal capacity for a threatened injury to itself which would allegedly result from the removal of the Lau Brothers from the KFCM Board, the appointment of Lane, and the cancellation of the franchise agreement.

The section does not define what "oppression" is, but relief under s. 181(l)(a) is only available if those who have control conduct the affairs of the company in a manner oppressive to Leong Hup, or the directors of KFCM have exercised their powers in a manner oppressive to Leong Hup or either species of acts aforesaid are being done in disregard of Leong Hup's interest in KFCM **as members**. Under s. 181 (1)(a) the act required is one of KFCM or the resolution is one proposed by the members of KFCM and it must unfairly discriminate against Leong Hup in its capacity as a member or shareholder of KFCM.

I do not think it correct to say, nor do I think that Mr. Abraham should be understood to have submitted that s. 181 of the Act does not apply to public companies in Malaysia. What was being submitted was that the primary facts set out in the petition by way of complaint could not constitute "oppression" as envisaged by s. 181 of the Act because the rights and interests which Leong Hup claimed were about to be transgressed in the EGM had no basis in fact or in law, and that the English and Commonwealth cases demonstrated this to proof.

The alleged factual basis of the right to restrain the respondents voting for the resolutions

Two or more shareholders may come to an agreement that in exercising any voting rights the shares held by them shall only be voted as agreed. Such an agreement has been referred to as a pooling agreement.

Greenwell v. Porter [1902] 1 Ch. 530 was such a case. Greenwell bought some shares in a company on the express condition that the vendors would support the election of two directors nominated by him and upon their retirement vote for their re-election. The Court granted an injunction to stop the vendors voting against their re-election. In *Puddephatt v. Leith* [1916] 1 Ch. 200 the Court granted a mandatory injunction to enforce an agreement by the mortgagee of shares in a limited company to vote in accordance with the wishes of the mortgagor where the agreement to do so was clearly spelt out in a letter collateral to the mortgage deed. Yet again *In re A and B.C. Chewing Gum Ltd.* [1975] 1 WLR 579 there was an express contract between Topps Chewing Gum Incoporated, an American company which bought a third of the shares from two brothers who owned the remaining two thirds in A and B.C. Chewing Gum Ltd. (the English Company). The purchase was on the basis that Topps though holding only one-third of the Englih Company would be entitled to equal control and representation on the Board of the English Company. Reference may also be made to *Greenhalgh v. Arderne Cinemas Ltd.* [1951] Ch. 286 where the Mallard family who wholly owned Arderne Cinemas Ltd. agreed to accept a loan from Greenhalgh on terms that in addition to the debenture he should become a director, have the unissued shares allotted to him and **have a collateral voting agreement whereby the Mallard family should vote with him.** (There is a useful summary of this case in *Gower's Principles of Company Law* 3rd edition at page 571. See also Article *Pooling Agreements, Under English Company Law* by Stephen Kruger in 94 LQR page 557).

This material was not cited to us but is nevertheless quite useful in so far as it is illustrative of the kind of evidence which is required to satisfy a Court that there is an agreement **in fact** between shareholders to vote in a particular way on matters which concern them.

In *Leong Hup's* case there is no suggestion whatsoever in the petition that there was any express agreement reached between Kevin and Francis Lau on the one hand and Ishak and George Ting on the other about March 1993 or at any other time that the latter would ensure perpetual board representation for Leong Hup in the manner claimed in the petition. Indeed the only agreement to come out of these negotiations was the management agreement on 12 March 1993 and there is no suggestion that this contained anything other than the terms on which Leong Hup was to **manage** the activities of KFCM in the "upstream operations". Board representation only came on 28 June 1993, and this was at an Annual General Meeting.

In the course of submissions in the Court below (AR. page 200) Mr. Abraham pointed out that paragraph 10 of the petition stated that the representations leading to the management agreement had been made by the first and second respondents as individual shareholders whereupon at the instance of the trial Judge Mr. Narayanan said that since these representations had resulted in an agreement between KFCM and Leong Hup he would be amending the petition "so as to leave no doubt that the first and second respondents acted at all material times in their capacity as directors". Mr. Narayanan did not say so expressly but the inference is irresistible that he meant as directors of KFCM.

There is no information in the petition as to what their share composition was in KFCM or in any of the fourth, fifth, sixth and seventh respondents at that time. Over a year later Golden Plus, the fourth respondent, transferred all its shares to the fifth and sixth respondents.

There is no allegation in the petition that:

(i) in March 1993 Ishak and George Ting held any shares or any office in Golden Plus such that they should be deemed to be in control of Golden Plus; or that

(ii) in bringing about the management agreement the first two respondents were acting as the servants or agents of Golden Plus Holdings Bhd. which is a public company. Even if they were, there is no allegation that any obligations Golden Plus may have had by virtue of the ownership of these shares, passed to the fifth and sixth respondents upon transfer.

There is a bald statement in the petition that the first, second and third respondents control the shares in KFCM owned by the fifth and sixth respondents but not a word to explain how such control comes about. There is no allegation at all about the seventh respondent, TA Nominees, being controlled by the first and second respondents. But all these respondents (i.e. first to seventh) are lumped together as the "Ishak faction".

The word "faction" is pejorative and calculated to produce negative emotions. So let it be said straightaway that it is not illegal for two or more stockholders to unite, upon a course of corporate action, or upon the officers they choose to elect or remove provided that in doing so they do not contravene any express statute or contract or contemplate any illegal object, fraud or oppression against the other shareholders of the company.

The "Second" and "Third Agreements" alleged by Leong Hup only add up to bolstering Leong Hup's original claim that by virtue of the management agreement and the representations which preceded it Leong Hup was entitled to permanent representation on the board of KFCM. Since there were no express provisions in any agreement upon which they could rely Leong Hup had to fall back on a claim to a legitimate expectation that through the Lau Brothers on the KFCM board Leong Hup had an inviolable right to participate in the affairs of the company.

The two subsidiary questions which then arise are:

(i) was there a legitimate expectation? and

(ii) if there was, did it bind all the other shareholders of KFCM or to put it another way did s. 128 override s. 181?

The problems associated with legitimate expectations in public companies has been well covered in *Company Law* by Farrar (3rd edition -1991) at pages 464 and 465. The relevant passages read as follows:

> Obviously, the position will vary greatly from the small private companies, commonly called quasipartnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the day-to-day operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.
>
> However, as Lord Wilberforce stressed in *Ebrahami v. Westbourne Galleries Ltd*. the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the agreement then there is little room for finding further legitimate expectations beyond those outlined in the documents.
>
> The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.
>
> That is not to say that s. 459 does not apply to larger private companies and public companies for the section is clearly not limited to quasi-partnership. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members of such companies. For example, in *Re Blue Arrow p1c* the petitioner failed to establish any expectation that the company's articles would not be altered so as to enable her to remain in office. Vinelott J pointed out that as the company was a public listed company, outside investors were entitled to assume that the whole of the company's constitution was contained in its articles and was not subject to other expectations or agreements which were not disclosed.

By way of distinguishing them Mr. Narayanan has cautioned us against applying the Commonwealth decisions across the board and I think it will be useful to say something about this. When we talk of legitimate expectations we inevitably have to apply the equitable considerations that a Court should take into account when dealing with a claim of a minority shareholder of oppression, or unfair prejudice. It is to be noted that whilst extending the scope of the remedies available s. 181(2) provides that winding up shall be one of the remedies. Section 218(l) of our act provides that the Court may order the winding up if:

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

(i) the Court is of opinion that it is just and equitable that the company be wound up;

The words in (f) are somewhat different but the effect is very similar if not the same. Self-interest, unfair, or unjust conduct could also amount to oppression, unfair discrimination or conduct which is unfairly prejudicial to minority interests.

Ebrahimi v. Westbourne Galleries [1973] AC 360 proceeded on a consideration of s. 222(f) of the English Companies Act 1948 which is in *pari materia* with our s. 218(f). A quasi-partnership in a small company can exist between a small group of individuals as also between two companies (see in *re A & B. C. Chewing Gum Ltd.* - [1975] 1 WLR 579]. In *Ebrahimi* there was no express agreement about participation; the legitimate expectation to participate arose because in the circumstances of that case the relationship was deemed to be a quasi-partnership with a fundamental understanding as to participation in the conduct of the business, an understanding, I should add, to which **ALL** the shareholders were privy. In *re A & B.C. Chewing Gum Ltd.* the right to participate was not a legitimate expectation, but arose out of an express agreement between ALL the shareholders. It is rooted in our legal philosophy that the Courts will not compel specific performance of agreements which involve continuous supervision. When mututal confidence breaks down between partners the remedy under s. 222(f) is to wind-up because it is just, equitable so to do.

Section 210 of the English Companies Act 1948 was intended to provide an alternative remedy to winding-up under s. 222(f). This s. 210 was very similar to our s. 181 except that s. 210(1) did not contain any reference to unfairly prejudicial conduct by controllers or oppressive exercise of directors powers **in disregard of members interests** and had no equivalent to our s. 181(b) i.e. unfair discrimination, or prejudicial acts and resolutions. Remedial action could be taken under s. 210(2) except that it was in the contemplation of the English section that a winding-up should not be ordered even though the acts complained of were required to justify a winding-up.

Section 75 of the Companies Act 1980 replaced s. 210 of the English Companies Act 1948. This section in turn was replaced by s. 459 of the English Companies Act 1985. Section 75(l) and 459(l) are identical and reads as follows:

> 459(l) **[Application for order that affairs conducted in unfairly prejudicial way]** A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

The Court's power to grant relief spelt out in s. 75 have now been transposed to s. 461 of the 1985 Act. What is important from the Malaysian view point is that whereas prior to s. 75 of the 1980 Act the English Courts were concerned under s. 210 with the breaches of legal rights, the scope was now enlarged to provide relief for conduct unfairly prejudicial to the interests of members as members. Under our law the "interests of members" is covered by s. 181(a) and conduct which is "unfairly prejudicial" is covered by s. 181(b). In other words s. 75 and s. 459 of the English Act cover the same ground as our s. 181(1).

This is a convenient point to refer to *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1988] 2 MLJ 227 where at pages 228 and 229 Lord Wilberforce compared the Malaysian s. 181 with its English and Australian counterparts. At the risk of some distortion I think that what that judgment says is that the injury contemplated by our s. 181(1) and the range of remedies provided by our s. 181(2) is, wider than what was provided by the English s. 210. To that extent the English decisions turning on s. 210 have to be read with caution.

That said we must now come back to the key issue and that is whether the acts complained of amount to "oppression" or "disregard". Here I want to refer again to Lord Wilberforce at page 229 of *Re Kong Thai* where he said:

> Secondly, for the case to be brought within s. 181(l)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made *(Elder v. Elder & Watson Ltd.):* their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale).* Neither "oppression" nor "disregard" need to be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point of time, can be held to have crossed the line.

The "oppression", "disregard" or "unfair discrimination" allegedly demonstrated in the present case was that the requisitionists (who were not a party or privy to the representations allegedly made which resulted in the management agreement), had called for an EGM proposing resolutions to remove the Lau Brothers, and the probability that at the EGM the majority of the shareholders would vote the Lau Brothers out.

If Leong Hup had a legitimate expectation which was enforceable against the respondents it could claim oppression and disregard. But in the absence of the required foundation how was that legitimate expectation to arise? The historic passage by Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* [1971] A.C. 360 at page 379 and 380 has already been set out in Y.A. Tuan Talalla's judgment (pages 33 to 35) and I need not repeat it here.

The general rule is that a party is not entitled to disregard the obligation he assumes upon entering a company and the Court is not entitled to dispense him from it. The superimpostion of equitable considerations which entitles a shareholder to participation by way of an assured directorship requires the three elements of that "something more" which Lord Wilberforce spelt out at page 389 all of which are plainly missing.

The last element was the one which Mr. Abraham took such pains to emphasise. There is no reported decision where in the absence of either a fundamental understanding or an express contract to that effect embodied in the Articles or otherwise, a Court has upheld a claim to a legitimate expectation to participation in the management of a public company by way of a permanent seat on the Board of Directors, and the critical reason for its absence is that the aggrieved shareholder can sell his shares, so take out his stake and go elsewhere. In

quasi-partnership cases where such a right of participation has been recognised as a legitimate expectation, the remedy for its breach was not specific performance by compelling the hostile factions to continue in double-harness but to wind-up. The reason for this was spelt out by Lord Wilberforce at page 380 of the report where he said:

> My Lords, this is an explusion case, and I must briefly justify the application in such cases of the just and equitable clause. The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove (compare *In re Wondoflex Pty. Ltd.* [1951] VLR 458). And quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or on re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or *mala fides*. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved.

Words to the same effect can be found in *Re Saul D. Harrison & Sons plc* [1994] BCC 475 at page 490 where Vinelott J described how a legitimate expectation could arise out of a fundamental understanding between all the shareholders which formed the basis of their association, quoted Lord Wilberforce, and then said:

> Thus in the absence of "something more" there is no basis for a legitimate expectation that the board and the Company in general meeting will not exercise whatever powers they are given by the articles of association.

It is worth underscoring that this case was brought under s. 459 of the Companies Act 1985 and the Wilberforce approach in the *Ebrahimi* case was now being used to determine not just whether there were grounds for winding-up but whether the conduct complained of was unfairly prejudicial. Two further passages from the judgment now follow:

at page 488:

> In deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationship of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association.
>
> The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company. As a matter of ordinary company law, this may or may not entitle the individual shareholder to a remedy.

at page 489:

> Although one begins with the articles and the powers of the board, a finding that conduct was not in accordance with the articles does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief. There is often sound sense in the rule in *Foss v. Harbottle.* In choosing the terms 'unfairly prejudicial', the Jenkins Committee (at para. 204) equated it with Lord Cooper's understanding of 'oppression' in *Elder v. Elder & Watson* 1952 SC 49 at p. 55:
>
> > 'a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.'

The core of Mr. Abraham's submission was that a private agreement between some individual shareholders in a public company can never give rise to a legitimate expectation of a right to directorship as against the company or all its shareholders entitled to vote in a general meeting.

As appears from his written judgment the trial Judge did not attempt to distinguish the cases cited in support of this proposition. If they applied the petition had to go. We must therefore look at them once more.

Re Ringtower Holdings plc [1989] 5 BCC 82. The facts in so far as they are relevant to us are that the petitioners held all the shares in a group of family companies. These shares they exchanged or shares in another company, Ringtower Ltd. with a view to a merger with another group of companies headed by A & M Holdings Ltd. With a view to flotation a new company, Ringtower Holdings plc was set up ("the company"). It was the common intention that the petitioners would be appointed to the board of the company in which the petitioners held 5.5% of the capital. **They were not so appointed**. One of the complaints of the petitioners was that they had wrongfully been excluded from management. The critical passage is at page 93 reads:

> The landmark decision of the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* [1973] AC 360 has, I fear, only too often given encouragement to pleaders to aver associations based on mutual confidence in circumstances very different from those which, I venture to say, the House of Lords ever contemplated. No doubt in almost every case of a small or private company persons coming together to form a new company would not do so without placing trust and confidence in those who are to be the directors and managers of the company. But the fact that the company is small or private is not enough, and that mutual trust and confidence would not in itself be sufficient to make the members' association in substance a partnership with partner-like obligations owed by each member to the others, in the absence of proof of a mutual understanding as to those obligations. In the present case Mr. Heslop did not suggest that all the members of Ringtower had mutual understandings such as gave rise to the claimed legitimate expectations, but he submitted, it was sufficient that **some** should have such understandings.
>
> He referred me to *Re a Company No. 00477 of 1986* [1986] 2 BCC 99, 171. In that case a s. 459 petition was presented by petitioners who had sold all the shares in a private company to a public company controlled (though not wholly owned) by A and B, for shares in that public company. A and B had made specific representations to the petitioners *inter alia* as to the management roles of the petitioners and that the association between the petitioners and A and B would be one of partnership. The petitioners alleged that the representations were false and fraudulent and asked to be bought in. The application to strike out was based purely on the facts alleged in the petition and *Hoffman J* with hesitation refused to strike out. It is to be noted that that case does not decide that there was, or that it could be argued that there

was a quasi-partnership between part only of the members. It merely decides that in the circumstance and in the light of those representations, the petitition was demurrable. I can derive little assistance therefrom in the very different circumstances of the present case where there are no equivalent representations, the documentation is so detailed and the shareholdings of the petitioners and Mr. Atkins and Mr. Morley only amount to 11 percent of the issued share capital.

I would add that I would regard both Ringtower and the company (until art. 5 was altered) as a company from which a minority shareholder was free to extricate himself upon just terms without a winding up. Under art. 5 a member desiring to transfer shares could do so at a price which was not discounted for a minority holding and if other members were not willing to purchase at that price the shareholder was free to sell to an outsider and the directors were bound to register the transfer. I cannot see how on the facts of this case it is even arguable that there was a quasi-partnership giving rise to legitimate expectations and hence relief against all the respondents.

Nor can I see how any legitimate expectation could otherwise even arguably have arisen. In my judgment there is simply no room for the arising of any legitimate expectation. The parties had not left the basis of their relationship only to the articles of association which were adopted as part of the transaction whereby the Aeresta group had been acquired, but had spelt out in detailed agreements all the matters which were to govern their relationship, nor surprisingly so, given that the majority holder which could cause any resolution to be passed was content with only a non-executive role. The art. 5 agreement demonstrates that where more was required for the protection of the petitioners as minority shareholders than the formal documentation, it was the subject of a specific agreement recorded in writing. The petitioners can point to nothing like that to counter the clear wording of the service agreement. Mr. Morley's alleged representations do not touch on Mr. P.M. Schwarcz's position and cannot reasonably be understood as meaning that even if Mr. H.T. Schwarcz broke the service agreement and caused the indefinite postponement of a flotation he would still continue to participate in management. Nor is there anything to suggest that Mr. Morley's remarks were made on behalf of any other member.

Accordingly, I reach the clear conclusion that the claim that the petitioners had legitimate expectations not limited to their rights under Service Agreement is manifestly unsustainable.

Re Blue Arrow plc [1981] BCLC 585 concerned a private company which had gone public. The petitioner was the founder of the company. Her shareholding was then substantial. After it became public as a consequence of the company's expansion her shareholding was reduced to 2.1 % of the whole. She was the President of the company and also a director. Sometime after she resigned as a director she wanted to resume an active part in the company's affairs. The relevant portion of the headnote reads:

... but this was resisted by the other directors who also formed the view that she should be removed from her position as president. To this end the directors proposed that the company's articles should be altered so that the board by majority vote could remove the president from office. The petitioner presented a petition under s. 459 of the Companies Act 1985 alleging that the affairs of the company were being conducted in a manner unfairly prejudicial to her in that she had a legitimate expectation that she would participate in the affairs of the company and that contrary to such expectation the proposed alteration to the articles of the company would result in her exclusion from the company and applied on motion for interim relief restraining the company from putting to the annual general meeting a special resolution to amend art 122. The respondent applied to strike out the petition.

Held - Motion dismissed and petition struck out. The right of the petitioner to be president of the company was not a class right but was a right personal to the petitioner and could therefore be altered by special resolution. In connection with a petition under s. 459, the

interests of a member of a company were not limited to the strict legal rights under the constitution of the company as the court could also pay regard to wider equitable considerations in deciding what were the interests of a member. On the facts, since the outside investors were entitled to assume that the whole of the constitution of the company was contained in the articles and Companies Acts, there was no basis for finding that the petitioner had a legitimate expectation that the company's articles would not be altered so as to enable her office to be terminated in ways other than those already provided for in the articles.

The parallels which need underlining were these. KFCM was not a small private company. It was a public listed company. Even if it was accepted that Leong Hup bought the shares it did between 24 February and l March 1993 on the basis of the representations of the first and second respondents that it would always have board representation on KFCM that was a private agreement between Leong Hup and **some** of the directors of KFCM who at best controlled 32.67% of KFCM's votes.

This private arrangement that the Lau Brothers would always sit on the board of KFCM was not made a part of the company's articles or disclosed to the investing public. The management agreement was silent on any question of board representation. The subsequent appointment of the Lau Brothers to the KFCM board was by the company in its AGM i.e. by a majority of all the shareholders present. There was nothing to stop Leong Hup from disposing all its shares on the open market. For that matter there was nothing to stop the fourth to the seventh respondent from disposing its shares either. Indeed the figures given in the petition show that there was a change in the percentages of the shares held by the parties. In March 1993 Leong Hup only acquired 20.27%.

By the time of the confrontation Leong Hup had increased its stake to 29.65% i.e. by about another 9.5 million shares. With these kind of movement taking place the "cause of action" Leong Hup claimed lacks definition. Was its alleged entitlement to board representation binding on KFCM as a company, and/or against **ALL** the shareholders of KFCM and/or against the fourth to the seventh respondents, and/or all the shareholders of these companies? If these shareholders in turn sold their shares, as they were free to do, were these new shareholders bound to keep Leong Hup's nominees on the board of KFCM as Leong Hup wished? Viewed in this light the boundaries of Leong Hup's claim to board representation and the indentities of the parties against whom that claim was said to be enforceable becomes nebulous to the point of negating the suggestion that their alleged right had crystallised into an enforceable cause of action.

So far as legitimate expectation is concerned I need not go into the other cases cited except to say that *Re Tottenham Hotspur plc* [1994] Vol. BCLC 655 is yet another instance where the Court declined to take cognizance of an alleged private arrangement between two shareholders as to control in a public company. From any point of view KFCM cannot be regarded as a quasi-partnership between just Leong Hup and Ishak and George Ting or the interests they are alleged to have represented in March 1993. It may be that at that time these people were prepared to leave matters relating to their share ratios and increases of capital in KFCM fluid thus indicating mutual trust and confidence but if they regarded these matters as important we think it was imperative not only that agreements on such matters should have been put into writing but also the articles of association should have been amended so as to substantiate the claim that is now being made.

Counsel for the other respondents adopted Mr. Abraham's submission and added some arguments of their own which I will now deal with.

Despite the internecine strife between the Lau Brothers and the first, second, third and ninth respondents it is not being alleged here by Leong Hup that the directors of KFCM are running the company into the ground or that the assets are being wasted. The complaint here is wholly geared to one threatened occurrence only i.e. the proposed removal of the Lau Brothers from the board of KFCM and the appointment of Lane in their place. Leong Hup's only **interest** which is going to be affected is the presence of the Lau Brothers as **directors** in KFCM, as Leong Hup's nominees.

Mr. Y.M. Siew referred to *In re A Company* [1983] 1 Ch. 178. This is a petition under s. 75 of the Companies Act 1980 i.e. the same section as s. 459 of the 1985 Act and our s. 181. Although the complaint was not one of exclusion from participation the issue was whether there was conduct which was unfairly prejudicial to the petitioners' interests as **members** of of the company. At page 189 of the report Lord Grantchester said this:

> However, the language of s. 75(l) still seems to require the interpretation that he must be so prejudiced in his capacity as 'member qua member'. This, of course, was how the courts interpreted s. 210. In a small private company it is legalistic to segregate the separate capacities of the same individual as shareholder, director or employee. His dismissal from the board or from employment by the company will inevitably affect the real value of his interest in the company expressed by his shareholding. It is precisely this recognition which makes the House of Lords decision in *In re Westbourne Galleries Ltd.* [1973] A.C. 360 so notable.

In my view, these two passages are most germane to the problem which arises at this hearing. To my mind, in passing s. 75, Parliament did not intend to give a right of action to every shareholder who considered that some act or omission by his company resulted in unfair prejudice to himself. In argument, an example was advanced of a shareholder who objected to his company carrying out some operation on land adjoining his dwelling house, which resulted in that house falling in value. It is not difficult to envisage an act or omission on the part of a company rendering an asset of a shareholder, other than his shares, of lesser value. In my judgment s. 75 is to be construed as confined to "unfair prejudice" of a petition "qua member", or, put in another way, the word "interests" in s. 75 is confined to "interests of the petitioner as a member". I do not consider that *In re Westbourne Galleries Ltd.* [1973] AC 360, which was a decision involving s. 210 in very different circumstances, requires a wider scope to be given to s. 75. The decision in that case was primarily concerned with the rights of a member to obtain a winding up order on just and equitable grounds and not on what constituted "oppression" for s. 210 purposes.

Mr. Augustine Poh referred us to *Re Lundie Brothers Ltd*. [1965] 2 All ER 692. This was a small company which was in substance a partnership between three people. One of them was removed as a working director by the other two by resolutions passed first at a board meeting in December 1993 and second at an AGM in January 1993. The passage at page 698 by Plowman J reads:

> Bearing in mind those principles, if this were a partnership and not a company I should have no hesitation in concluding that Mr. Blackmore is entitled to an order for dissolution on the ground that the termination of his employment as a working partner was an unjustified exclusion of him from the partnership business. The trouble, I think, was the Lundie brothers were too inclined to regard the business as their business, perhaps not unnaturally. They started the business: they were responsible for the formation of the company, and the company bore their name. In law, however, Mr. Blackmore had an equal right in the business as being in substance a partner in it.

Various reasons have been suggested to explain why his employment as a working director of the company was terminated. The Lundie brothers thought that he was not pulling his weight; there was obviously an incompatibility of temperament between Mr. Blackmore and Mr. Reginald Lundie and there were disputes between them. At one time the matter came to blows, but it has not, I think, been suggested that the faults were all on one side. As I have said, I am satisfied that Mr. Blackmore has made out a case for saying that he is entitled to a winding-up order on a just and equitable ground.

That does not mean, however, that he is entitled to succeed in so far as his claim rests on s. 210. He has to go further and satisfy me that at the date of the presentation of this petition the affairs of the company were being conducted in a manner oppressive to him as a member of the company. "As a member of the company" means, of course, as a shareholder of the company. The distinction between the sort of case which a petitioner has to make out in order to establish a claim for dissolution on a just and equitable ground, in a partnership case, and the sort of case which he has to establish to succeed under s. 210 was mentioned by LORD KEITH in his judgment in the Scottish case of *Elder v. Elder & Watson, Ltd.* 1952 SC 49 and the passage I have in mind is a passage (1952 SC at p. 60) which was adopted by JENKINS LJ, in the case of *Re H.R. Hartner, Ltd.* [1058] 3 All ER 689. The passage is this [1958] 3 All ER at p. 701:

It is not lack of confidence between shareholders per se that brings s. 210 into play, but lack of confidence springing from oppression of a minority by a majority in management of the company's affairs, and oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder. Cases like that of *Loch v. John Blackwood Ltd.* [1924] All ER Rep. 200; [1924] AC 783 and *Thomson v. Drysdale* [1952] SC 311 might, I think, readily have come under s. 210. I doubt whether a case like *Re Yenidje Tobacco Co. Ltd.* [1916-17] All ER Rep. 1050; [1916] 2 Ch. 426 could be brought under this section.

In other words, Mr. Blackmore has to go beyond making out a case for winding-up on the principle of *Yenidje Tobacco Co. Ltd.* [1916-17] All ER Rep 1050; [1916] 2 Ch. 426 and has to establish some element of lack of probity or fair dealing to him in his capacity as a share holder in the company. In my judgment he has wholly failed to do that. His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That it seems to me, has nothing to with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that remunerations as a director of the company has been reduced. That related to his status as a director of the company and not to his status as a shareholder of the company.

The prayers A, B, D and E in the petition are specifically geared to the threatened removal of the Lau Brothers as directors of KFCM and prayer B is just s. 181(a) and (b) of the Act paraphrased. Counsel for Leong Hup did not succeed in showing me why these two cases should not be applied here.

Mr. Poh emphasised that Golden Plus Bhd. (a public company) was not alleged to be a party to the so called agreements relied upon by Leong Hup. It was a separate legal entity from KFCM or the first, second and third respondents. Apart from a single allegation that the first three respondents somehow controlled 32.66% of KFCM shares once registered in the name of Golden Plus there is nothing else alleged against the 4th respondent. In these circumstances he submitted that the prayers B(i) and (ii), C, D, E, and I were completely misconceived because these prayers presuppose that Golden Plus were parties to the agreements made by the Lau Brothers with the first three respondents. He then referred to *Pleadings, Principles and Practice* by Jacob and Goldrein [1990] at page 220 where the passages read:

(a) In an action on contract the statement of claim will be struck out and the action dismissed:

(i) if it appears clearly that there is no contract between the plaintiff and the defendants (*South Hetton Coal Co. v. Haswell Co.* [1898] 1 Ch. 465),

(c) Where it is clear that the action must fail, or the pleading discloses a case which the court is satisfied will not succeed, or that no relief can be granted at the trial, the action will be stayed or dimissed. (*Barrett v. Day* [1980] 43 Ch. D 435).

Even if there was a specific agreement between the Ishak faction and the Lau Brothers that Leong Hup would be given permanent representation on the board the respondents' second submission was that such an agreement could not stop KFCM from tabling an ordinary resolution for the removal of the Lau Brothers from its board.

It turns on the statutory provisions of the Act which he contends, totally precludes Leong Hup from the relief it claims. It starts with s. 128(l) of the Act which reads:

128. (1) A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed.

The section is similar to the s. 184 of the English Companies Act 1948. The point is that if the company is a public company it has an unfettered right to remove a director regardless of what the articles may say: This was brought out in *Bentley-Stevens v. Jones & Others* [1974] 1 WLR 638. In this case the first defendant as director purporting to act by order of the board (although no board meeting was held) convened an EGM to pass a resolution to remove the plaintiff from the board. The plaintiff filed a writ and applied for an injunction to restrain the other directors and the company from acting on the resolution which was passed. Plowman J said this at pages 640 - 641:

Secondly, it was submitted on behalf of the plaintiff that even if sufficient notice of the meeting was given, a board meeting of the defendant company was necessary before an extraordinary general meeting of that company could be validly convened, and no such meeting was ever held, with the consequence that the extraordinary general meeting was not properly convened and its proceedings were therefore a nullity.

Alternatively, Mr. Heyman, on behalf of the plaintiff, submitted that this was what is popularly known as "quasi-partnership" case and that on the principles enunciated by the House of Lords in *In re Westbourne Galleries Ltd.* [1973] AC 360 the court should restrain the first and second defendants, as two of the three partners in the quasi-partnership, from expelling the third partner, namely, the plaintiff.

I will deal with the first and second submissions together. In my judgment, even assuming that the plaintiff's complaint of irregularities is correct this is not a case in which an interlocutory injunction ought to granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same. In *Browne v. La Trinidad* [1887] 37 Ch. D 1, 17, Lindley LJ said:

> I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment.

It seems to me that the motion which is before me falls within the principle stated by Lindley LJ.

> However, that still leaves the *Westbourne Galleries* point. But in my judgment there is nothing in that case which suggests that the plaintiff is entitled to an injunction to interfere with the defendant company's statutory right to remove the plaintiff from its board. What it does decide is that if the plaintiff is removed under a power valid in law then he may, in appropriate circumstances, be entitled to a winding up order on the just and equitable ground.

The submission here is that a public company cannot contract out of its right to remove a director by ordinary resolution notwithstanding anything in its articles and notwithstanding anything in any agreement between the company and the director that he should not be removed. Here the Lau Brothers had no such agreement with KFCM. If it was being suggested that the first three respondents had entered into such an agreement as agents of KFCM that would not be of any assistance to Leong Hup either. It has not been suggested that the first three respondents entered into the so called agreements as agents of the fourth to the seventh respondents but even if that were so it could not affect the overriding effect of s. 128(l) of our Act. The Lau Brothers held office as directors of KFCM by virtue of a contract with KFCM an KFCM alone, an office to which they could only be elected by the shareholders of KFCM alone.

Kenanga Nominees and TA Nominees, the sixth and seventh respondents, were not directors of KCFM. Even assuming that they as shareholders would vote along with the other shareholders to expel the Lau Brothers, the power to vote in general meeting is not a fiduciary power, and a shareholder owes no duty to anybody as to how he exercises his vote: *Northern Counties Securites v. Jackson & Steeple* [1974] All ER 625. Since Leong Hup was contending that the first, second and third respondents should not be permitted to cast the votes they allegedly controlled it will be useful to reproduce two from the judgment of Walton J. The first is at page 635:

> Putting this into less formal language, what counsel for directors submitted was that although it is perfectly true the act of the members in passing certain special types of resolutions binds the company, their acts are not the acts of the company. There would, he submitted, be no real doubt about this were it not for the use of the curious expression 'the company in general meeting' - which, in a sense, drags in the name of the company unnecessarily. What that phrase really means, he submitted, is 'the members (or corporators) of the company assembled in a general meeting', and that if the phrase is written out in full in this manner it becomes quite clear that the decisions taken at such a meeting, and the resolutions passed thereat, are decisions taken by, and resolutions passed by, the members of the company, and not the company itself. They are therefore in the position of strangers to the order and not in contempt by their act in voting as they please, whatever its effect may be.
>
> In my judgment these submissions of counsel for directors are correct. I think that in a nutshell the distinction, is this. When a director votes as a director for or against particular resolution in a directors' meeting, he is voting as a person under a fiduciary duty to the company for the proposition that the company should take a certain course of action. When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company who is exercising his own right of property to vote as he

thinks fit. The fact that the result of the voting at the meeting (or a subsequent poll) will bind the company cannot affect the position that in voting he is voting simply as an exercise of his own property rights.

Perhaps another (and simpler) way of putting the matter is that a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors; a shareholder who casts his vote in general meeting is not casting it as an agent of the company in any shape or form. His act, therefore, in voting as he pleases cannot in any way be regarded as an act of the company.

The second is at page 636 and 637:

I now come to para 4 of the notice of motion, which seeks an order restraining the individual respondents and each them from voting against the resolution. Counsel for the plaintiffs says that, as the executive agents of the company, they are bound to recommend to its shareholders that they vote in favour of the resolution to issue the shares, and hence, at the least, they cannot themselves vote against it for they would thereby be assisting the company to do that which it is their duty to secure does not happen. If as executive officers of the company they are bound to procure a certain result if at all possible, how can they, as individuals, seek to frustrate that result?

I regret, however, that I am unable to accede to counsel's arguments in this respect. I much regret it, because I cannot see how, in common honesty, directors who have committed a company to a particular course of action can themselves seek by their own acts as individuals to frustrate it, more especially when they will thereby be rendering the company liable to pay damages, and possibly very heavy damages indeed, But even if that were not the case, the point on commercial honesty would remain.

However, I do not see where this is meant to lead me. Suppose, for example, that a minority of the board had been throughout strenuously opposed to the company entering into this contract are they nevertheless as individuals to lose control of their right to vote adversely thereto? Suppose that, before the question of implementation arose there had been a complete change in the character of the composition of the board, and the existing board were all bitterly hostile to their predecessors' action? True it is that they would still be bound to procure the company to honour it undertakings, but it is far from clear to me on what principle they would be obliged, at the least, to have their own votes as members sterilised. Suppose that the members of the present board resigned on the eve of the meeting; would they then be entitled to vote as ordinary members, or not? These examples show, I think, that counsel's proposition is far from self-evident. I think it is wrong. I think that a director who has fulfilled his duty as a director of a company by causing it to comply with an undertaking binding on it is nevertheless free, as an individual shareholder, to enjoy the same unfettered and restricted right of voting at general meetings of the members of the company as he would have if he were not also a director.

Transposed to s. 128(l) of our Act the proper meaning of "A public company may by ordinary resolution remove a director ..." means that a simple majority of the shareholders of the company may vote to remove a director and no agreement made by the directors or the company can fetter that right. The Courts will not interfere with the statutory right of shareholders to remove directors: *Soliappan v. Lim Yoke Fan* [1968] 2 MLJ 21; *Dato' H.M. Shah & Ors. v. Dato' Abdullah b. Ahmad* [1991] 1 MLJ 91 - a Supreme Court decision which applied s. 128(l) and upheld the shareholders' right to terminate the appointment of the executive chairman and managing director of the company in the 9 month of a three-year contract with the company appointing him to those positions.

As I have said earlier it is far from clear what sort of voting arrangement or agreed restraint the Court is supposed to imply from the alleged underlying agreements, or from the second and third agreements which would more properly be described as a truce or even as a stand-off. In the petition the first three respondents were alleged to have acted in their individual capacity. In his submissions in the Court below Mr. Narayanan said they were acting in their capacity as directors of KFCM. Before us it was submitted that s. 128(1) did not apply because it is limited to agreements between the company and a director concerning the tenure of a directorship whereas in the present case the claim to a legitimate expectation arose out of agreements between shareholders. But the first three respondents did not hold any shares in KFCM. There is no proper material in the petition from which I should infer that they were acting on behalf of **ALL** the other shareholders of KFCM. In these circumstances it is impossible for me to hold that the fourth, fifth, sixth and seventh shareholders were not entirely free to vote at the EGM in any way they pleased because they had a statutory right to do so which was in no way constrained by any agreement to the contrary. In my view therefore the second submission also succeeds and s. 128(l) must be held to override the provision of s. 181. The intent of the resolution was to do precisely what s. 128(l) expressly permitted.

The petition alleges that Lane acted in "cahoots" with the first, second and third respondents. This slang word of uncertain origin is intended to suggest that there was some sort of conspiracy going on between the respondents in seeking to remove the Lau Brothers from the KFCM board. Here I need to reiterate that it is the petition which alleges that the franchise agreements were concluded by KFC International on the basis that George Ting would be in control. I am totally unable to understand why if KFC International or Lane thought that the franchise agreements were being breached they should not take whatever legal steps were required to protect their own interests, including if necessary cancellation of the franchise agreements. This was a contractual dispute between KFCM and KFC International which had nothing directly to do with Leong Hup. I agree with Encik Ghazi that to drag KFC International into this petition under s. 181 was totally misconceived, because that section is confined to providing relief to shareholders of a company in their disputes *inter se.* As to the allegations of intermeddling and conspiracy. I think it is elementary that an actionable conspiracy can only arise where there is a combination to do an unlawful act. The facts stated in the petition leave it equally open that the real and predominant purpose of the respondents was to advance their own lawful interests in the franchise agreements by remedying the breaches of which KFC International and Lane were complaining and they believed those interests would suffer if they did not vote the Lau Brothers off the KFCM board. Their unity of purpose thus would not be unlawful even if damage is so caused to Leong Hup. See *Crofter Hand-Woven Harris Tweed Co. v. Veitch* [1942] AC 435 *Gower on Company Law* 3rd edition at page 562 says:

> Scattered throughout the reports are statements that members must exercise their votes "*bona fide* for the benefit of the company as a whole", a statement which suggest that they are subject to precisely the same rules as directors. But it is clear that this statement is highly misleading, and that the decisions do not support any such rule as a general principle. On the contrary, it has been repeatedly laid down that votes are proprietary rights, to the same extent as any other incidents of the shares, which the holder may exercise in his own selfish interests even if these are opposed to those of the company. (*North-West Transportation v. Beatty* [1887] 12 App. Cas. 589 PC; *Burland v. Erle* [1902] AC 83, PC; *Goodfellow v. Nelson Line* [1912] 2 Ch. 324).

Since there is nothing in the petition from which it can safely be inferred that there was any agreement binding the **shareholders** of KFCM from casting their votes as they thought fit, and there is nothing unlawful about voting directors off the board in a general meeting this complaint about cahoots or collusion or conspiracy also fails. Indeed if contrary to the views of the Lau Brothers the shareholders of KFCM thought it in their best interest to jettison the Lau Brothers and join hands with Lane I cannot see why they should be prevented from doing so.

The only other matter I wish to touch upon is prayer I which claims that the first to the fifth respondents hold the franchise agreements in trust for KFCM. This bare assertion has got no materials in the body of the petition to support it and is accordingly rejected.

In the result I allow these appeals. The interim injunction made by the trial Judge on 2 March 1995 and the other orders of the trial Judge appealed against are set aside. The petition is struck out. The deposits made by each of the appellants shall be returned to them.

This judgment has been read in draft by Y.A. Dato' Siti Norma Yaakob and Y.A. Dato' Haji Abdul Malek bin Haji Ahmad who have concurred with my views. Our decision therefore is unanimous.

The Court will now adjourn to a date to be fixed to hear the arguments of Counsel on the orders we should make for costs.